

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 16 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0161
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FRANK BALLESTEROS, JR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103241001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Ronald Zack, P.L.C.
By Ronald Zack

Tucson
Attorney for Appellant

ESPINOSA, Judge.

¶1 After a jury trial, appellant Frank Ballesteros, Jr. was convicted of aggravated assault, a dangerous, domestic-violence offense. After finding he had two or more historical prior felony convictions, the trial court sentenced him to a presumptive

prison term of 11.25 years. On appeal, Ballesteros argues the evidence was insufficient to sustain his conviction.

¶2 In reviewing a claim of insufficient evidence, we view the evidence “in the light most favorable to sustaining the conviction” and resolve all reasonable inferences against the defendant. *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981). We do not reweigh the evidence, and will affirm if substantial evidence supported the jury’s verdict. *Id.* “Substantial evidence” is evidence sufficient for a rational trier of fact to have found the defendant guilty beyond a reasonable doubt. *Id.*

¶3 In September 2010, Ballesteros and his girlfriend, A.B., had argued after Ballesteros arrived at the home the couple had shared, and the argument became physical when they began pushing and shoving one another. Ballesteros then punched A.B. in the face and struck her repeatedly as she tried to get away. When A.B.’s son found her shortly after the assault, and after Ballesteros had left the house, “she was sliced . . . in the back . . ., she was cut, and she was bleeding, and her face was pretty messed up,” and she told him Ballesteros had done it. She was treated at a hospital emergency room for multiple injuries, including a stab wound to her back.

¶4 A.B. initially had provided police with details of a knife she had seen during the fight, and a police officer investigating the scene found a knife on the roof of the house. But when A.B. testified at trial under subpoena, she recalled only that there had been “a struggle with an object” Ballesteros had been wielding that she “kn[e]w . . . was something to hurt” her. Although she stated at trial that she did not remember Ballesteros using the object to stab her, she acknowledged that, other than her physical fight with Ballesteros, she could think of nothing else that would have caused her to suffer a stab wound.

¶5 On appeal, Ballesteros notes A.B.’s failure at trial to recall whether the object Ballesteros wielded during the assault had been a knife and whether he had used it to cause her stab wound. He appears to suggest that, absent testimony from an “eye-witness to the knife, . . . [or an] eye-witness to the injury” to A.B., as it had occurred, the evidence necessarily was insufficient to support a conviction for aggravated assault, a dangerous offense, based on his use of “a deadly weapon or dangerous instrument.” A.R.S. § 13-1204(A)(2); *see also* A.R.S. § 13-105(13). But “[b]oth direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction,” *State v. West*, 226 Ariz. 559, ¶ 16, 250 P.3d 1188, 1191 (2011), and “a criminal conviction may rest solely upon proof of a circumstantial nature,” *Tison*, 129 Ariz. at 553, 633 P.2d at 363.

¶6 Here, the evidence and reasonable inferences from it were more than sufficient for the jury to return its verdict finding Ballesteros guilty of aggravated assault using a knife, a dangerous instrument.¹ Accordingly, Ballesteros’s conviction and sentence are affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez

GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

¹The verdict form returned by the jury specified that it found the aggravated assault was “of a dangerous nature involving the use of a dangerous instrument, to wit: a knife.”